IN THE COURT OF APPEALS OF IOWA

No. 0-660 / 08-0876
Filed November 24, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TIMOTHY ALLEN SMITH,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom, Pre-trial Motions, and Don C. Nickerson, Trial, Judges.

Timothy Smith appeals from his convictions of child endangerment. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Timothy Allen Smith, Anamosa, pro se.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, John P. Sarcone, County Attorney, and Jeff Noble and Frank Severino, Assistant County Attorneys, for appellee.

Heard by Vogel, P.J., and Vaitheswaran, J., and Huitink, S.J. Tabor, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VOGEL, P.J.

Timothy Smith appeals from his convictions of child endangerment, following a trial to the court on February 27, 2008. On direct appeal, Smith claims his counsel was ineffective for (1) failing to lodge hearsay objections to both a history and physical report on the child victim, as well as certain witnesses' testimony, and (2) in stipulating to facts describing the victim's injuries. Further, Smith argues that the district court erred in failing to grant him a new trial following the re-creation of portions of the transcript, which were lost during trial on the failure of the court reporter's equipment. Pro se, Smith argues there was insufficient evidence to sustain his convictions.[1]

I. Background Facts and Proceedings

In February 2007, Timothy Smith was charged with five counts of child endangerment to his son, J.S., born November, 2005. Smith was married to Paula during the time period when J.S. was injured. They have one other son, N.S., born February 2003.

Three major incidences encompassed the child endangerment charges. The record reveals the following from which the court could have based its findings. The first incident occurred in December 2005. J.S. was five weeks old, and as the Smith family was preparing to leave to go shopping, Smith became upset with J.S. He ordered Paula to leave the house, and then he muffled the infant's cries with his hand. Less than five minutes later, Paula noticed J.S.'s lips

[1] We note noncompliance with the rules of appellate procedure, requiring the name of each witness whose testimony is included in the appendix to appear at the top of each page where the witness's testimony appears. *See* Iowa R. App. P. 6.905(7)(*c*).

were puffy and there was blood in his nostrils. Smith admitted during the trial to putting his hand over J.S.'s mouth, possibly causing swelling.

The second incident occurred in May and June 2006. Beginning May 26, Paula testified that J.S. began to vomit nearly every time he was fed. On May 30, he was admitted to the hospital for dehydration, stayed the night, and was discharged the following morning. Paula took him to the doctor on June 2, but J.S. continued to vomit, and on June 8, following a CT scan, the doctors determined he had suffered a skull fracture and a bi-lateral chronic subdural hematoma, requiring installation of a shunt. A child abuse investigation ensued, and Smith gave several varying explanations of how this injury could have occurred. The Iowa Department of Human Services (DHS) determined allegations of child abuse were founded, but did not determine who the perpetrator was. The children were removed from the Smith home. N.S. was placed with his paternal grandparents; he was joined by J.S. two weeks later, after he was released from the hospital. Because it was a founded child abuse report, the DHS had continued involvement with the family, with the goal that the children be returned to the home. Both children were returned to their parents in November 2006.

The third incident occurred on December 15, 2006. Paula left for work at approximately 9:00 a.m., leaving J.S. with Smith. Paula testified J.S. had no visible injuries when she left. Around 3:20 p.m., Paula's sister, Joan, arrived to watch the children when Smith left for work. The children were napping until approximately 4:15 p.m., when J.S. awoke and Joan noticed he was dazed, lethargic, and unresponsive. She also noticed a bruise on his forehead. Joan

decided he needed medical attention, and called her mother who drove them to the hospital. When Paula arrived at the hospital, she was visibly upset about J.S.'s condition. In contrast, when Smith arrived, he was angry and defensive, requiring the hospital staff to monitor his movements. J.S. was diagnosed by Dr. Katherine Martin, a pediatric emergency room doctor, with a fresh skull fracture that extended from the right to the left frontal lobe, subdural hematomas, and a brain injury, which were considered to be life-threatening injuries.

The following experts testified for the State: Dr. Martin, Dr. Judith Ann Haggen, pediatric urgent care physician, and Dr. Resmiye Oral, an associate professor of pediatrics and medical director of the Child Protection Program at the University of Iowa Hospital. Dr. Martin treated J.S. when he was admitted to the emergency room in December 2006, and testified she believed the injury occurred that day, and J.S. was "one of the most [critical] children I've seen. The—in the top five critical children I've seen since I've been employed at Mercy Hospital." She notified DHS due to J.S.'s "multiple and severe markings . . . his profoundly abnormal mental status as far as there was no explanation, whatsoever." She testified that these types of injuries would not occur in normal play with another child. Dr. Haggen treated J.S. in the pediatric intensive care unit and testified that these types of injuries generally occurred from "nonaccidental trauma," or "inflicted trauma." Dr. Oral, although she did not examine J.S., was called by the State as an expert witness in the field of child abuse. Prior to trial, she reviewed J.S.'s medical records related to his admission to the hospital in June and December 2006, in addition to his primary care records. She testified that the force necessary to cause such injuries would be

similar to a child being thrown out of a car as a result of a motor vehicle accident. Defense expert, neurologist Dr. John Meyer, who also did not examine J.S., testified the force used to inflict the injuries on J.S. could be likened to an adult forcibly hitting an infant in the head with a baseball bat. He acknowledged Smith's explanations did not account for how the injuries could have occurred.

Paula informed DHS investigator Susan McAnigle that J.S. was healthy when she left for work on the morning of the December 2006 incident. Smith gave varying accounts of how the injury occurred. Detective Larry Penlund testified that in investigating the source of J.S.'s injury, he heard Smith's varying explanations: that N.S. hit J.S. with an open hand; N.S. threw J.S. in the air and Smith "heard a thump;" and also that J.S. fell backwards onto the carpeted floor. Smith informed McAnigle that J.S. and N.S. were tugging on a blanket and J.S. fell off the couch, hitting his head on the floor. Smith informed Dr. Haggen that J.S. and N.S. were fighting over a blanket and N.S. shoved J.S., causing him to hit his head on the floor. Smith also informed Dr. Haggen that N.S. picked up J.S. and flung him in the air. Dr. Haggen testified that none of these explanations could cause the severity of the injuries. Even Smith's own expert, Dr. Meyer, did not find any of these explanations would have caused J.S.'s injuries, as he testified, "I think the statements that the father made to me were not physically possible." Following further investigation, Smith was charged with multiple counts of child endangerment.

After a three day trial to the court, Smith was convicted of five counts of child endangerment against J.S., in violation of Iowa Code sections 726.6, 726.6A, 726.6(5), 726.6(6), and 726.6(7) (2005). Counts three, four, five, and six

merged with count one, multiple acts of child endangerment in violation of sections 726.6 and 726.6A. The district court found Smith's explanation of J.S.'s injuries was not credible, and concluded he "engaged in an intentional act and in doing so used unreasonable force which caused serious and skeletal injuries (brain bleeding, brain swelling and a skull fracture) to [J.S.]" Smith was sentenced to be imprisoned for a period not to exceed fifty years under sections 902.9 and 902.3. He appeals.

II. Ineffective Assistance of Counsel

Smith asserts counsel was ineffective for failing to object to the admission of State's exhibit eighteen and for failing to raise hearsay and confrontation clause objections during witnesses' testimony. We review ineffective-assistance-of-counsel claims de novo. *State v. Stewart*, 691 N.W.2d 747, 750 (Iowa 2004). In order to succeed on a claim of ineffective assistance of counsel, a defendant must prove by a preponderance of evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Fountain*, 786 N.W.2d 260, 262 (Iowa 2010). A claim may be resolved on either prong. *Id.* If "the court determines the claim cannot be addressed on appeal, the court must preserve it for a postconviction-relief proceeding, regardless of the court's view of the potential viability of the claim." *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

A. Exhibit Eighteen

Hearsay objection

Smith first argues counsel was ineffective for failing to object to the admission of State's exhibit eighteen, a history and physical report of J.S.,

authored by J. Michael M. Metts, D.O. of Blank Children's Hospital, dated June 8, 2006. Smith asserts the report was hearsay and not admissible under Iowa Rule of Evidence 5.804 because there was no finding that the person(s) who contributed to the creation of the report were unavailable to testify. Iowa R. Evid. 5.804 (allowing admission of hearsay when the declarant is unavailable). The State responds that exhibit eighteen was admissible under Iowa Rule of Evidence 5.703 and 5.705 (allowing experts to testify to otherwise inadmissible hearsay, in forming an opinion).

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the trial or hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Iowa R. Evid. 5.703. Iowa Rule of Evidence 5.705 continues, "The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise." If the trial judge determines the hearsay is "reasonably relied upon" by experts as required by the rule, the court has discretion to admit the underlying hearsay evidence. *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 182 (Iowa 2004).

The history and physical was clearly a report that contained hearsay; that is the observations and conclusions of a non-testifying person, the content of which was offered to prove the truth of the matter asserted—including that J.S. sustained a likely nonaccidental trauma. *State v. Musser*, 721 N.W.2d 734, 751 (Iowa 2006). However, even if counsel would have lodged a hearsay objection, it would not have been sustained. *See id.* (stating that a report made during the

regular course of business is admissible under the business-records exception, and a qualified witness can testify to such). In addition to Dr. Oral's use of the report to form the basis of her opinion under Iowa Rule of Evidence 5.703, a report or diagnoses is not excluded by the hearsay rule when made at or near the time the information was transmitted by a person with knowledge and kept in the course of a regularly conducted business activity. Iowa R. Evid. 5.803(6).

The history and physical report was made on June 8, 2006, approximately six months before the December 2006 injuries; injuries which prompted Smith's arrest for child endangerment. The report documented J.S.'s medical history as well as a report of his June 2006 injuries. It noted that the June incident was nonaccidental in nature and also noted that DHS was notified.

Dr. Oral relied on this report when testifying as to whether J.S. suffered a nonaccidental trauma, and she concluded that J.S. suffered an "inflicted head trauma" in both the June and December incidents. *See e.g. State v. Hanes,* N.W.2d ___, ___ (Iowa 2010) (explaining that statements made for the purpose of medical diagnosis are admissible if the proponent of the statement shows: (1) the declarant's motive in making the statement is consistent with the purposes of promoting treatment, and (2) the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis); *See Brunner v. Brown*, 480 N.W.2d 33, 35 (Iowa 1992) (holding an expert may testify as to an opinion formed from inadmissible hearsay). Further, the medical report was made in the course of regularly conducted business activity, and was of a type reasonably relied upon by an expert in Dr. Oral's particular medical field. Iowa R. Evid. 5.803(6) (hearsay exception to records and diagnosis kept in the regular

course of business). As Dr. Oral was qualified to form an expert opinion on otherwise inadmissible hearsay, and utilized a report made at the time of J.S.'s May/June injury, the report was properly admitted under Iowa Rule of Evidence 5.803(6). We find that counsel was not ineffective in failing to lodge an objection to exhibit eighteen.

Confrontation Clause

Smith further argues counsel was ineffective for failing to object to the report, asserting it was testimonial in nature, because it was prepared in anticipation of trial, therefore it violated the Confrontation Clause of the United States Constitution. U.S. Const. amend. 6 (guaranteeing that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."); *Crawford v. Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354, 1364, 158 L. Ed. 2d 177, 192 (2004) (explaining that the Confrontation Clause applies to "witness" statements against the accused that are a solemn declaration made for the purpose of establishing or proving some fact). The State responds that the medical report is "irrelevant" to a *Crawford* claim, as it was created and used primarily for treatment of the patient, secondarily for use as evidence, and unless the primary purpose of the report was to bear witness against Smith, *Crawford* does not apply. *Crawford*, 541 U.S. at 51, 124 S. Ct. at 1364, 158 L. Ed. 2d at 192.

If a report is prepared in the course of regularly conducted activity, for business purposes, not wholly in anticipation of litigation, it is nontestimonial. *State v. Musser*, 721 N.W.2d 734, 754 (Iowa 2006). If a report is a nontestimonal statement, an objection under the Confrontation Clause would have no merit, and

thus would not have to be raised at trial. *Id*. The primary purpose of the medical report in exhibit eighteen was not to bear testimony against Smith, but was created as a medical record for diagnosis and treatment of J.S.'s June 2006 injuries. *Crawford*, 541 U.S. at 51, 124 S. Ct. at 1364, 158 L. Ed. 2d at 192. The report was clearly made in response to J.S.'s injuries with no indication of future use at a trial. The report was not testimonial in nature, but introduced at trial to assist Dr. Oral in opining as to the nature of the current injuries, based in part on the previously prepared history, exam, and treatment report of J.S. Counsel owed no duty to object to the admission of exhibit eighteen on a confrontation violation.

B. Hearsay Claims—Witnesses

Smith next challenges counsel's failure to raise hearsay objections during several witnesses' testimony. Regardless of whether an objection should have been made, prejudice will not be found where substantially the same evidence is introduced elsewhere in the record without objection. *State v. McKettrick*, 480 N.W.2d 52, 60 (Iowa 1992) (explaining the effect of cumulative testimony).

Smith argued Dr. Martin should not have been allowed to testify regarding a CT scan she ordered, but which was read by radiologist Dr. Greg Kirkpatrick. While Dr. Martin did testify to parts of Dr. Kirkpatrick's CT report, Dr. Martin was with Dr. Kirkpatrick as he was reading the CT scan and noting the area of concern. When testifying, Smith's counsel objected to Dr. Martin reading portions of the CT report verbatim, but acknowledged a paraphrasing or summarizing of the report was allowed as Dr. Martin relied on Dr. Kirkpatrick's observations and conclusions for purposes of treating J.S. If an expert bases an

opinion on facts learned prior to trial, then reasonably relied upon in pursuing a course of action for treatment, those facts need not be admissible in evidence. Iowa R. Evid. 5.703; *Hutchison v. Am. Family Mut. Ins. Co*., 514 N.W.2d 882, 884 (Iowa 1994).

Next, Smith argued Dr. Oral should not have been allowed to testify to a CT scan that indicated blood from the December fracture was different from the June 2006 fracture, as well as other medicals records from the June 2006 incident. Again, we find no objection would be required of counsel as this hearsay issue reverts back to the same exception to the hearsay rule as noted above. Iowa R. Evid. 5.803(6) (a report is admissible as an exception to the hearsay rule if prepared during course of a regularly conducted business activity); *Brunner v. Brown*, 480 N.W.2d 33, 34 (Iowa 1992) (stating an expert may testify to the presentation of data to the expert outside of court and other than by his own perception).

Smith further argues Detective Penlund should not have been allowed to testify as to Paula and Joan's denial of culpability. We find no breach of counsel's duty by failing to object to Detective Penlund's statement, as Paula and Joan both testified to their denial of culpability to any injuries to J.S. Smith also argues Dr. Oral should not have been allowed to testify regarding Smith's covering J.S.'s mouth to muffle his crying in December 2005, as her information was based on a DHS report. However, Smith himself admitted to putting his hand over J.S.'s mouth; as such, counsel had no duty to object to statements that were admitted based on the cumulative testimony.

Finally, Smith objected to the testimony of Paula, and statements she made regarding a threat of losing custody of her children, as well as statements by Alva Smith "advising" her about her choices. Smith further objected to statements by DHS investigator Jackie Stanley regarding her exclusion of N.S. as a cause of the injuries to J.S. While a seemingly inflammatory remark made in front of a jury could give rise to a presumption of prejudice, a bench trial is unique, as courts are acutely aware of defendant's right to a fair trial, and how it is essential for trial courts to be impartial in the treatment of defendant, counsel, and witnesses. *See State v. Farnum*, 397 N.W.2d 744, 746 (Iowa 1986) (stating that while rules of evidence apply to both bench and jury trials, there is less need for strict application of the rules in a bench trial); *State v. Gavin*, 360 N.W.2d 817, 819 (Iowa 1985) (discussing jury prejudice). Further, nothing in the court's finding of facts indicates that it relied on inadmissible evidence. *See State v. Weaver*, 608 N.W.2d 797, 804 (Iowa 2000) (discounting various assignments of error, as there was no indication the trial judge relied on inadmissible evidence in its findings).

The district court found Smith's credibility to be sorely lacking, and the evidence that he committed intentional acts upon his young son "compelling." We find none of the statements he now raises as objectionable caused him prejudice during the trial to the court. *See State v. Geier*, 484 N.W.2d 167, 173 (Iowa 1992) (explaining that by virtue of training and experience, the court is better able to compartmentalize evidence regarding admissibility and guard against the prejudice during a trial).

III. Stipulation to Injury

Exhibit eleven is the stipulation of the State, defense counsel, and Smith, to the fact that based on the brain injury observed on December 15, 2006, J.S. was "diagnosed with a fresh skull fracture, sub-dural hematomas and a brain injury." Smith asserts this stipulation allowed the district court to find that the December 2006 was a recent injury and not an aggravation of the previous injury. Although this could have prejudiced Smith, it did not, as Dr. Haggen, Dr. Martin, and Dr. Oral testified that the December 2006 injuries revealed a recent trauma. Counsel had no duty to forgo entering a stipulation where the same facts and conclusions were brought out in the trial testimony.

IV. Record Re-Creation

Smith argues that the district court erred in failing to grant him a new trial following the re-creation of portions of the transcript that were lost during trial on the failure of the court reporter's equipment. The State asserts error was not preserved. We agree. Smith filed a notice of appeal of his convictions on May 15, 2008. Smith later sought a limited remand for the purpose of recreating that portion of the record which was lost. On May 7, 2009, our supreme court granted a limited remand. When a case is remanded for a limited purpose, as it was here, the district court's authority extends only to that which is mandated by the appellate court. *See In re Marriage of Davis*, 608 N.W.2d 766, 769 (Iowa 2000); *State v. O'Shea*, 634 N.W.2d 150, 158 (Iowa Ct. App. 2001). Any action contrary to or beyond the scope of the mandate is null and void. *Marriage of Davis*, 608 N.W.2d at 769. Therefore, when the "remand limits the issues for determination, the court on remand is precluded from considering other issues, or new matters."

Id. Once Smith filed his appeal in May 2008, the district court was divested of jurisdiction, except for that given to it on limited remand. The case was remanded to the district court "for the limited purpose of reconstructing the record of the first day." The motion for a new trial was not filed until August 14, 2009, and the court did not have jurisdiction to rule on the motion. Because the court lacked jurisdiction, the court did not err in not granting a new trial, and the issue is not preserved for our review.

V. Pro Se Issues

Smith asserts pro se that there was insufficient evidence to prove that in December 2005, he put his hand over J.S.'s nose and mouth, completely obstructing his airways. He asserts Paula's testimony was not truthful such that his conviction under count six can be upheld. We review sufficiency of the evidence for errors at law. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). "We uphold a verdict if substantial evidence supports it." *State v. Maas*, 743 N.W.2d 870 (Iowa Ct. App. 2007). The district court's findings of fact are binding on appeal unless not supported by substantial evidence. *Kennedy v. State*, 688 N.W.2d 473, 477 (Iowa 2004). Under count six, the court found,

> Defendant did an intentional act using unreasonable force which caused bodily injury to his son, [J.S.], on December 21, 2005 in Polk County, Iowa. Specifically, the Defendant forcefully placed his hand over his infant son's mouth in an attempt to stop his crying and in doing so caused the child a bodily injury (swollen lips and bleeding). Under the excessive force alternative, the State has proven all of the elements of *Child Endangerment Resulting in Bodily Injury* beyond a reasonable doubt.

The record contains sufficient evidence that Smith covered J.S.'s nose using excessive force. Paula testified, and Smith corroborated this story, in part.

The question is not whether Smith covered his mouth in addition to his nose, but whether Smith did an intentional act which resulted in bodily injury (i.e. bleeding from the nose) in violation of 726.6, as charged. We find there was sufficient evidence, including Smith's own testimony, that he did an intentional act using unreasonable force which caused injury to J.S.

Smith next argues the State failed to prove beyond a reasonable doubt that he inflicted the head trauma to J.S. in the May/June incident. The district court was in the best position to evaluate credibility. *See State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006) (stating it was up to fact-finder to place credibility where it belonged). The court found Paula to be a credible witness and loving parent, whereas it repeatedly found Smith's credibility was lacking, as he fabricated various implausible stories as to how J.S. could have suffered his life threatening injuries. We find substantial evidence supports the district court's finding of guilt as to count three (the May/June injury).

Lastly, Smith argues the district court erred when it found him guilty on count one—multiple acts of child endangerment, or three acts within a twelve month period. Although the district court set forth detailed fact finding as to each incident, Smith does not challenge any particular finding; he simply claims he was not the perpetrator. The details provided by the district court's ruling accurately reflect the credible evidence introduced at trial. Coupled with the court's low regard for Smith's credibility, we find substantial evidence supports the district court's fact findings and conclusions.

We conclude counsel was not ineffective in failing to make hearsay objections to testimony and evidence which was either, non-hearsay, admissible

under an exception to the hearsay rule, or cumulative of admissible evidence; in not lodging a confrontation objection to the history and physical report; or in stipulating that J.S. "was diagnosed" with a fresh injury after the December 2006 incident. We also conclude the district court did not have jurisdiction following the remand to grant a new trial. Finally, sufficient evidence supports Smith's convictions. We affirm.

AFFIRMED.